Order

Michigan Supreme Court
Lansing, Michigan

Entered: July 16, 2002

Maura D. Corrigan,
Chief Justice

Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Clifford W. Taylor
Robert P. Young, Jr.
Stephen J. Markman,
Justices

1999-65

Amendments of Rules 2.309, 2.310, and 2.312 of the Michigan Court Rules

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On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, Rules 2.309, 2.310, and 2.312 of the Michigan Court Rules are amended, effective January 1, 2003.

[The present language is amended as indicated below.]

Rule 2.309 Interrogatories to Parties

(A)-(B) [Unchanged.]

(C) Motion to Compel Answers. The party submitting the interrogatories may move for an order under MCR 2.313(A) with respect to an objection to or other failure to answer an interrogatory. If the motion is based on the failure to serve answers, proof of service of the interrogatories must be filed with the motion. <u>The motion must state that the movant has in good faith conferred or attempted to confer with the party not making the disclosure in an effort to secure the disclosure without court action.</u>

(D)-(E) [Unchanged.]

Rule 2.310 Requests for Production of Documents and Other Things; Entry on Land for Inspection and Other Purposes

(A)-(B) [Unchanged.]

(C) Request to Party.

(1)-(2) [Unchanged.]

(3) The party submitting the request may move for an order under MCR 2.313(A) with respect to an objection to or a failure to respond to the request or a part of it, or failure to permit inspection as requested. If the motion is based on a failure to respond to a request, proof of service of the request must be filed with the motion. <u>The motion must state the movant has in good faith conferred or attempted to confer with the party not making the disclosure in an effort to secure the disclosure without court action.</u>

(4) - (5) [Unchanged.]

(6) Unless otherwise ordered by the court for good cause, the party producing items for inspection shall bear the cost of assembling them and the party requesting the items shall bear any copying costs.

(D) [Unchanged.]

Rule 2.312 Request for Admission

(A) - (B) [Unchanged.]

(C) Motion Regarding Answer or Objection. The party who has requested the admission may move to determine the sufficiency of the answer or objection. The motion must state that the movant has in good faith conferred or attempted to confer with the party not making the disclosure in an effort to secure the disclosure without court action. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of the rule, it may order either that the matter is admitted, or that an amended answer be served. The court may, in lieu of one of these orders, determine that final disposition of the request be made at a pretrial conference or at a designated time before trial. The provisions of MCR 2.313(A)(5) apply to the award of expenses incurred in relation to the motion.

(D)-(F) [Unchanged.]

Kelly, J. (*dissenting*). I oppose the addition of MCR 2.310(C)(6) for the reason that it encourages discovery abuses. The Michigan Judges Association is correct in asserting that this rule gives the advantage to the party with the greater financial resources. The question of allocating costs of copying should continue to be at the discretion of the trial court. As one prominent member of the bar pointed out in response to notice of this rule change: "I have noted an increasing trend by parties—both plaintiffs and defendants—to respond to even carefully tailored discovery requests by burying the targeted document within hundreds and even thousands of unrelated documents. The hope is apparently that the 'smoking gun' document will be lost in the midst of the avalanche of paper submitted by the respondent. My concern with the proposed rule is that it will encourage even more of this behavior, since the respondent cannot only provide hundreds or thousands of meaningless documents, but can do so assured that the cost of copying those irrelevant documents will be borne by his or her opponent . . . ."

Cavanagh, J., *concurs* with Justice Kelly's dissenting statement.

Taylor, J. (*concurring*). Justice Kelly claims the adoption of MCR 2.310(C)(6) will encourage discovery abuses. I do not agree. The problem she sees in the new rule, a rule, incidentally, that is widely in effect in the United States, is that a party requesting documents can be taken advantage of by the producing party deviously bombarding the requesting party with unwanted documents so as to bury the incriminating document and run up the costs. Yet, this has not been an insurmountable problem in other jurisdictions where the rule pertains and there is a reason for this. The reason is that litigants, aware of what documents they wish, can precisely request them.

However, if a party is not aware of the exact documents needed, the party can inspect first and then demand. Further, in the event a litigant is provided documents that are not responsive to the request, the litigant can petition the court for relief, which would undoubtedly be granted.

Staff Comment: The July 16, 2002 amendments of subrules 2.309(C), 2.310(C)(3), and 2.312(C), effective January 1, 2003, require that discovery motions include a statement that the movant has in good faith conferred or attempted to confer with the party not making the disclosure in an effort to secure the disclosure without court action. Subrule 2.310(C)(6) was added to clarify the respective responsibilities for the costs of discovery.

The staff comment is published only for the benefit of the bench and bar and is not an authoritative construction by the Court.